BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF	)	
	)	**CC DOCKET NO. 96-45**
FEDERAL-STATE JOINT BOARD	)	
ON UNIVERSAL SERVICE	)	

AMERICAN CENTER FOR LAW AND JUSTICE'S COMMENTARY ON *FURTHER NOTICE FOR PROPOSED RULE MAKING* IMPLEMENTING THE CHILDREN'S INTERNET PROTECTION ACT

Respectfully submitted,

AMERICAN CENTER FOR LAW AND JUSTICE

Jay A. Sekulow, Esq.
Chief Counsel
Colby M. May, Esq.
Director, Washington, D.C. Office

205 3rd Street, SE
Washington, D.C. 2003
(202) 546-8890

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SUMMARY

The ACLJ, because of its commitment to defending family values, urges the FCC to reexamine its enforcement obligations under the Children's Internet Protection Act , 47 U.S.C. § 254(h) ("CIPA"), and create a more stringent regime for enforcement than that proposed.

Public libraries and public schools were created to lend books, provide research tools, and make available educational opportunities to its citizens. The Supreme Court has described a library as "a place dedicated to quiet, to knowledge, and to beauty." Brown v. Louisiana, 383 U.S. 131, 142 (1966). Libraries and schools, therefore, have an affirmative duty to provide materials which will benefit the surrounding community and to restrict illegal and harmful materials.

Children's unrestricted access to the Internet fails to fulfill this duty. The Internet is obviously a very valuable educational resource, and many can benefit from access to that information resource free of charge at libraries and schools. The vast majority of the pornography which saturates the Web is neither educational, nor beneficial, and in many jurisdictions the exposure of minors to such materials is illegal. Therefore, pursuant to CIPA, to protect minor children and to maintain their federal funding, libraries and schools will have to adopt some form of realistic Internet filtering process for minors.

Under CIPA, the Commission is tasked with insuring that libraries and schools are complying with the Act by installing Internet protection software on their public access computers. To insure fulfillment of this responsibility, libraries and schools must provide easy and consistent public involvement. To do that, borrowing from the Commission's complex rules and enforcement mechanisms for the broadcast media, libraries and schools should maintain a public access file where a copy of its CIPA policy is maintained, and kept current, and where

complaints and resolutions are kept. Further, if the facility maintains a website, its policy and complaint resolution process and history should be posted on it.

Finally, given the clear mandate of Section 254 of the Communications Act, as amended, public libraries and public schools must have "internet safety policy and technology protection measures in place" and "certifications shall be made not later than 120 days after the beginning of such first program funding year." According to this plain language, *each* school and library must therefor have in place a "safety policy" plus the required filtering technology, and *each* school or library must certify that it is in compliance or lose funding. These requirements can not be met by general district or group certifications.

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I. INTRODUCTION

The American Center for Law and Justice ("ACLJ") is a nonprofit, public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family. ACLJ attorneys have successfully argued constitutional law cases in federal and state courts across the United States. *See, e.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *United States v. Kokinda*, 497 U.S. 720 (1990); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Frisby v. Shultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ, because of its commitment to defending family values, urges the FCC to reexamine its enforcement obligations under the Children's Internet Protection Act , 47 U.S.C. § 254(h), and create a more stringent regime for enforcement than that proposed in the captioned rulemaking.

Public libraries and public schools were created to lend books, provide research tools, and make available educational opportunities to its citizens. The Supreme Court has described a library as "a place dedicated to quiet, to knowledge, and to beauty." Brown v. Louisiana, 383 U.S. 131, 142 (1966). Libraries and schools, therefore, have an affirmative duty to provide materials which will benefit the surrounding community and to restrict illegal and harmful materials.

Children's unrestricted access to the Internet fails to fulfill this duty. The Internet is obviously a very valuable educational resource, and many can benefit from access to that information resource free of charge at libraries and schools. The vast majority of the pornography which saturates the Web is neither educational, nor beneficial, and in many jurisdictions the exposure of minors to such materials is illegal. Therefore, pursuant to the Children's Internet Protection Act , 47 U.S.C. § 254(h) ("CIPA" or "Act"), to protect minor children and to maintain their federal funding, libraries and schools will have to adopt some form of realistic Internet filtering process for minors.

Under CIPA, the Federal Communications Commission ("FCC" or "the Commission") is tasked with insuring that libraries and schools are complying with the Act by installing Internet protection software on their public access computers. Libraries and schools filling out a form and simply checking boxes does not insure such compliance, and in fact, insures widespread abuse of the system. The FCC has complex rules and enforcement mechanisms for the broadcast media to insure compliance with federal regulations. It likewise should have in place substantial oversight and enforcement mechanisms to insure that similar regulations are followed and adopted in implementing CIPA.

47 U.S.C. § 254 of the Communications Act, as amended,[2] requires that public libraries and public schools must have "internet safety policy and technology protection measures in place" and "certifications shall be made not later than 120 days after the beginning of such first program funding year." Consequently, according to the plain language of the statute, *each* school and library must have in place a "safety policy" plus the required filtering technology, and *each* school or library must certify that it is in compliance or lose funding. In addition, the statutory language sets forth the deadlines for compliance (there is no "grace period" for certification or compliance).

The ACLJ offers the following commentary to emphasize the important public policy enhanced by CIPA – the protection of children from obscenity, child pornography and harmful material -- and the constitutional basis for CIPA as a means of alleviating any concerns as to its viability. ACLJ's comments are also intended to rebut any comments for little or no enforcement of CIPA at all. Through such legal analysis, and suggested alternatives for enforcement, it is hoped that the FCC will take a more proactive approach to enforcement of CIPA.

II. THE GOVERNMENT HAS AN AFFIRMATIVE DUTY TO MAKE CERTAIN THAT THE NATION'S LIBRARIES AND SCHOOLS FULFILL THEIR RESPONSIBILITY TO PROTECT CHILDREN

Libraries have a duty to the public in their dealings with children. As the U.S. Supreme Court has stated: "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling . . . the

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[2] Pub. L. No. 106-554. Section 1721 of CIPA amends section 254(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* Section 1721 references section 1732 of CIPA, which amends section 254 of the Communications Act by adding a new subsection (l) at the end of 254.

legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. The judgment, we think, easily passes muster under the First Amendment." New York v. Ferber, 458 U.S. 747, 756-758 (1982) (citations and internal quotation marks omitted).

Accordingly, the Supreme Court has long held that the government has a compelling interest in protecting the physical and psychological well-being of minors. Ginsberg v. New York, 390 U.S. 629, 639-640 (1968); Sable Communications v. FCC, 492 U.S. 115, 126 (1988); Denver Area Educational Telecommunications Consortium v. FCC, 116 S.Ct. 2374, 2387 (1996). "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. This compelling interest extends to the state acting in *loco parentis* for children. As the Supreme Court reiterated in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986):

> This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico,* 457 U.S. 853, 871-872, 102 S.Ct. 2799, 2814-2815, 73 L.Ed.2d 435 (1982) (plurality opinion); *id.,* at 879-881, 102 S.Ct., at 2814-2815 (Blackmun, J., concurring in part and in judgment); *id.,* at 918-920, 102 S.Ct., at 2834-2835 (Rehnquist, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis,* to protect children–especially in a captive audience–from exposure to sexually explicit, indecent, or lewd speech.

Accordingly, the Court held that: "petitioner School District acted entirely within its permissible authority in imposing sanctions upon *Fraser* in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker* the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 685.[3]

There is *absolutely no constitutional protection* for child pornography, yet child pornography is on the Internet. As the Supreme Court held in Osborne v. Ohio, 495 U.S. 105, 111 (1989):

> First, as *Ferber* recognized, the materials produced by child pornographers permanently records the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

(Citations omitted).[4]

The use of children in pornography or predation of children on the Internet is not the only concern, however. It is the *exposure* of pornography to children which represents another real harm. The potential harm to children allows the imposition of regulations limiting Internet access. Filtering systems used for the purpose of protecting children is completely constitutional.

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[3] *Tinker v. Des Moines Indp. Sch. Dist.*, 393 U.S. 503 (1969).

[4] *See also* The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252, which makes it a crime to transport interstate, ship, receive, distribute, or reproduce visual depictions of minors engaged in explicitly sexual conduct. The unlawful receipt of such images includes "transport" by "computer." Accordingly, the violation of this law could easily create *per se* liability for libraries.

As the Supreme Court ruled in this regard in FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978):

> . . . broadcasting is uniquely accessible to children, even those too young to read. Although Carlin's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, 20 LEd2d 195, 88 S. Ct. 1274, 44 Ohio Ops 2d 339, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.,* at 640 and 639, 20 LEd2d 195, 88 S.Ct. 1274, 44 Ohio Ops 2d 339.

Similarly, the Internet (like broadcasting) "is uniquely accessible to children, even those too young to read." In the context of a library with unfiltered Internet access, it is more than possible that a child may be exposed to what an adult decides to view.

Unquestionably, the Internet contains material that is not suitable for children and that could be harmful to them if allowed to view such material. The argument that children can make choices concerning pornography is not only counter-intuitive, it is in most states illegal. "[D]uring the formative years of childhood and adolescence, minors often lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979). Therefore, to protect the welfare of children and to remove the possibility of any civil liability, Congress has mandated, pursuant to CIPA, that libraries and schools take reasonable steps to ensure that children do not access indecent or pornographic material through the use of the Internet.

It is in the context of the protection of children, that libraries may constitutionally use filtering systems or segregate certain computer systems with filtering software for the use of

children from "adult" computers. Otherwise, libraries open themselves up to liability for the inevitable harm caused to innocents viewing pornography for the first time.

III. THE USE OF FEDERAL FUNDING AS A MEANS OF LIMITING CHILDREN'S EXPOSURE TO PORNOGRAPHY IS CONSTITUTIONALLY DIFFERENT FROM THE CENSORSHIP OF BOOKS

The Federal District Court for the Eastern District of Virginia in Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp.2d 552 (ED Va 1998), declared that Internet filtering software used by a library is unconstitutional. That decision was wrong because the district court used an incorrect forum analysis; it confused access to publically available rooms in the library with the library collection itself. Publically available meeting rooms can easily become public fora, whereas the library collection cannot. As a result of using the wrong forum analysis, the court also erroneously required the library to show a compelling justification for its use of the Internet filtering software. Regardless of the erroneous holding, however, the Mainstream Loudoun court *did* hold that "minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment are compelling interests." 24 F. Supp. at 565. The court went on to hold that, although the challenged policy was over inclusive because it restricted adult Internet access, it would be possible to create a policy which would protect children. *Id.* at 567.

Also, the Fourth Circuit recently overruled a parallel decision by the same federal district court judge in Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000) (*en banc*), *cert. denied* 121 S. Ct. 759 (2001). In Urofsky, a constitutional challenge was brought against a Virginia law restricting state employees from accessing sexually explicit materials on computers owned or leased by the state. The district court ruled the law unconstitutional, and the Federal Court of Appeals for the

Fourth Circuit overturned that decision, holding such restrictions to be constitutional. As the Fourth Circuit ruled:

> We reject the conclusion of the district court that Va. Code Ann. §§ 2.1-804 to -806, restricting state employees from accessing sexually explicit material on computers owned or leased by the state except in conjunction with an agency-approved research project, infringes upon the First Amendment rights of state employees. We further reject Appellee's contention that even if the Act is constitutionally valid as to the majority of state employees, it is invalid to the extent it infringes on the academic freedom rights of university faculty.

Urofsky, 216 F.3d at 416. Similarly, in Mainstream Loudoun the library had a compelling justification in protecting minors and employees from the harmful and discriminatory effects of pornography. Nonetheless, the library should have been required to meet a lower threshold of scrutiny, and the use of this software should have been upheld.

More importantly, Congress is not mandating that libraries and schools must under all circumstances use filtering software. Instead, Congress is tying library and school receipt of particular federal funds to the use of filtering software for children. Like the U.S. Supreme Court's decision in National Endowment for the Arts v. Finley, 118 S.Ct. 2168 (1998), the government may decide on what speech it chooses to fund or endorse. The government is not compelled to fund children's access to pornography on the Internet.

Viewpoint discrimination is an effort to suppress the speaker's activity due to disagreement with the speaker's view. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). A viewpoint is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. The Supreme Court has consistently recognized that the government may allocate funding according to criteria that would not be permissible in enacting a direct regulation.

This principle was reiterated in Finley, when the Court noted that, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 2179. This principle is firmly ensconced in the Supreme Court's jurisprudence. "It is preposterous to equate the denial of taxpayer subsidy with measures aimed at the suppression of dangerous ideas." Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." Rust v. Sullivan, 500 U.S. 173, 193 (1991).

Just as the federal government may determine what types of art it chooses to fund, so too can public libraries and public schools choose the types of information they will make available to the public. Public libraries and schools' placement of Internet filtering software on computer terminals in no way restricts individuals' First Amendment rights. Libraries and schools which do so have merely made a choice to, in the words of the NEA regulation, "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public," Finley at 2172, when deciding which information to purchase.

This type of governmental decision stands in stark contrast to the broad provisions of the Communications Decency Act (CDA) which was struck down by the Supreme Court in Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1998). The major distinction between the CDA and CIPA is that CIPA is a control not over the Internet, but over the receipt of government funds.

Also, in her concurrence in Reno, Justice O'Connor makes clear that CIPA like legislation, unlike the CDA, would pass constitutional muster:

> Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. . . If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In *Ginsberg v. New York*, 390 U.S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still by the magazines.

117 S. Ct. at 2353 (O'Connor, J., concurring in part and dissenting in part). As opposed to the CDA, this legislation does not attempt to control the Internet at all. Instead, it controls the funding for the gateway through which children have access to the Internet.[5]

Finally, the CDA, Section 223(a)(1)(B)(ii) criminalized the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Another section, 223(d), prohibited the "knowing" sending or displaying, to a person under 18, of any message, "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

In contrast, placing Internet filtering software on public library and school Internet terminals does not in any way limit First Amendment activities on the Internet. Individuals may still engage in any type of speech they wish on the Internet. Then, through the use of software or delineated intranet connections, libraries and schools can choose which pieces of information it will make available to children.

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[5] Similarly, the challenges to the Child Online Protection Act, 47 U.S.C. § 231 ("COPA") are not applicable here. COPA sought to sanction those who "knowingly" make any commercial communication on the Internet "that is harmful to minors." In granting a preliminary injunction against the enforcement of COPA in ACLU v. Reno, 1999 WL 44852 (E.D.Pa., Feb. 1, 1999), the court ruled that it was "not apparent" that the government could meet its burden that "COPA is the least restrictive means available to achieve the goal of restricting access of minors to [harmful] material." 1999 WL 44852 at 24. The court also acknowledged, however, that "blocking or filtering technology" appeared to be a less restrictive way of achieving COPA's goals. *Id.*

The government's ability to purchase or fund material it deems suitable notwithstanding restrictions on "lascivious," "lewd," or "indecent" speech are not based on viewpoint. In R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992), the Court explained that, even though obscenity is unprotected speech, a State could not prohibit "only that obscenity which includes offensive *political* messages," to do so would constitute viewpoint discrimination. However, the First Amendment does allow the government to "choose to prohibit only that obscenity which is the most patently offensive *in its prurience--i.e.*, that which involves the most lascivious displays of sexual activity." *Id.* Thus, in enunciating this principle, the Court relied on the premise that distinctions based on "prurience" or "lascivious[ness]" are not viewpoint discriminatory. *See also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (punishment of public high school student for use of "offensively lewd and indecent" language in speech to students was "unrelated to any political viewpoint"); Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion) (removal of books from public school library because of their "pervasive vulgarity" would be permissible whereas removal of books because of their "ideas" would not).

The Second Circuit adopted this reasoning in General Media Communciations, Inc. v. Cohen, 131 F.3d 273 (2d. Cir. 1997), *cert. denied*, 118 S. Ct. 2637 (1998). Cohen involved a constitutional challenge to the Military Honor and Decency Act ("MHDA") which prohibits the sale or rental of recordings and periodicals at military exchanges "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d). The appellees argued that the MHDA targeted a "viewpoint portraying women as sexual beings or as the focus of sexual desire, as well as a viewpoint of lasciviousness." *Id.* at 281 (internal quotations marks omitted). In dismissing this argument, the court held that the adjective "lascivious" helps identify the particular subject matter or content

that the Act encompasses. From this, the court concluded that lasciviousness is not a viewpoint. *Id.* at 282.

The majority of Internet filtering software is designed to block *all* Internet sites which are deemed to be prurient or lascivious. They are not designed to block out only those pornographic materials which may express a certain viewpoint. The use of such software by public schools and libraries is constitutional, and is the only way, presently, in which they can provide their patrons with the Internet and still protect children from harmful materials. As the Court stated in Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45 (1983):

> In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Using this standard, libraries and schools are not forums required to provide sexual material to children. For libraries and schools (and the FCC) to exercise such discretion is not unconstitutional viewpoint discrimination.

For example, in Arkansas Educ. Television Comm'n v. Forbes, 118 S.Ct. 1633, 1637 (1998), a political candidate challenged a public television station's decision to exclude him from a televised debate, arguing that the televised debate was an open forum by government designation. The U.S. Supreme Court first addressed the question of whether public forum analysis was applicable in the broadcast setting. "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule." *Id.* at 1640. Thus, the Court recognized that forum analysis is usually inapplicable in occupations which require the use of editorial discretion.

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be

> particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based. To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. That editors--newspapers or broadcast--can and do abuse this power is beyond doubt, but calculated risks of abuse are taken in order to preserve higher values.

Id. at 1639 (internal quotation marks and citations omitted). Therefore, decisions such as "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum" by their very nature facilitate "the expression of some viewpoints instead of others." *Id.* If certain institutions were not allowed to exercise this discretion "we would exchange public trustee broadcasting, with all its limitations, for a system of self-appointed editorial commentators." *Id.* at 1640. These "[c]laims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters." *Id.*

Accordingly, a library or school is not an open forum by government designation, but instead is a government agency which can exercise editorial discretion in its purchasing power. In Finley, the Supreme Court emphasized that editorial discretion may be exercised by a governmental agency procuring art:

> And as we held in *Rust*, Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, 'the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Finley, 118 S.Ct. at 2178 (citations and internal quotation marks omitted). The Rust Court also specifically rejected the argument that government subsidies for the arts are equivalent to creating an open forum by government designation:

> The NEA's mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in

> *Rosenberger* – which was available to all student organizations related to the educational purpose of the University – and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to all newspapers and other periodical publications.

Id. (citations and internal quotation marks omitted). Common sense dictates that libraries and public schools, like the NEA, cannot purchase all of the art or books that are available, and consequently, must exercise aesthetic judgments.

IV. SUGGESTED CHANGES TO THE PROPOSED ENFORCEMENT MECHANISM

Checking boxes on a form will not insure compliance with CIPA. If checking boxes were all that were needed to insure compliance with FCC regulations, then the myriad of FCC telecommunications regulations wherein the FCC exercises its regulatory authority would be mere surfeit. However, the FCC has seen a need for more extensive enforcement mechanisms in a host of other mediums to insure compliance, and the conditions here warrant a more extensive enforcement mechanism as well.[6]

Thus, the ACLJ advocates adopting a similar regime as that used by the FCC for other telecommunications media, particularly broadcasting. First, each library and school accepting federal funds under CIPA should be required to state what its policy is and/or what filtering software they are using to comply with CIPA.[7] Such a statement would then become a public

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[6] Opponents of Internet filtering software, such as the American Library Association (ALA) and the American Civil Liberties Union (ACLU), have proposed several alternatives which they argue would be less restrictive and just as effective. *See generally*,ACLU White Paper, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries*, found at: <http://www.aclu.org/issues/cyber/box.html#battling> . It is not unreasonable to expect resistance to compliance from parties who have been active opponents of filtering software for years, and who now advocate that libraries should be held harmless if their filtering software does not accomplish the congressional requirements.

[7] The notion that school or library districts could vouch for CIPA compliance for the entire district would be ineffective and allow noncomplying facilities to be covered by a

record, which would be kept for public access in an appropriate office at the school or library. Amendments and changes to the policy should also be reported to the FCC annually, and placed in the public access file within thirty (30) days of enactment by the school or library. In addition, this policy statement should be posted on the library or school website, if any.

Such requirements are not unique; it is already an FCC requirement for broadcasters, and would likewise serve as a good public participation and enforcement mechanism here. *See* C.F.R. §§ 73.3526 & 73.3527 (requiring the maintenance of a public inspection file for commercial and public broadcasters). Each library and school should also be required to disclose any complaints that they receive with regard to Internet access. These complaints would then become a part of the library's and/or school's public access file. In addition, this public file would disclose how the library or school dealt with these complaints. A failure to follow any of these requirements would result in the restoration to the federal government of any and all federal funds received by that particular school or library, pursuant to the requirements of CIPA.

V. CONCLUSION

Libraries and public schools have a compelling interest to protect the physical and psychological well-being of children. These interests are compromised when Internet access is left unchecked and patrons, young and old, are unwillingly or unwittingly exposed to the hardcore pornography available throughout the Internet. The use of Internet filtering software is

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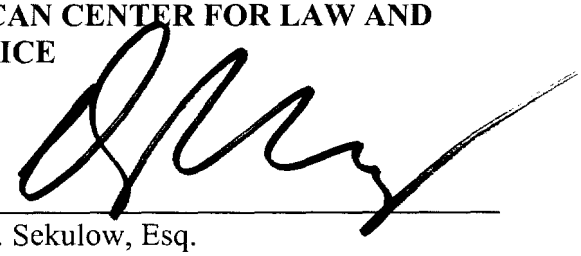
general compliance assertion by the district. Broadcasters and group owners are required to comply with the Communications Act, as amended, and countless regulations for each of their broadcast stations or facilities. Such a regime of individual compliance has served the public and the broadcast industry well for decades. So too should each school and library clearly and unequivocally be required to state not only that it is in compliance with CIPA, but also, what steps it has taken to comply.

a reasonable, viewpoint neutral regulation which accomplishes the goal of eliminating access to pornography, and fosters educational goals.

For these reasons, and those stated above, the FCC should implement more stringent oversight of the CIPA program by schools and libraries.

Respectfully submitted,

AMERICAN CENTER FOR LAW AND JUSTICE



By:_____

Jay A. Sekulow, Esq.
Chief Counsel

Colby M. May, Esq.
Director, Washington, D.C. Office

205 3rd Street, SE
Washington, D.C. 20003
(202) 546-8890

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